A

LIM GIAT ENG

v.

FARLIM GROUP (M) BHD

B

HIGH COURT MALAYA, SHAH ALAM
NORAINI ABDUL RAHMAN JC
[CIVIL SUIT T-TRACK 4: 22-744-2004]
31 JANUARY 2011

C ***CONTRACT:*** *Employment contract - Breach - Plaintiff absent from work for more than two consecutive days - Whether plaintiff breached contract of service - Whether plaintiff was present at site office - Whether defendant entitled to rely on Employment Act 1955, s. 15(2)*

D ***LABOUR LAW:*** *Employment - Dismissal - Plaintiff absent for more than two consecutive days - Defendant could not locate plaintiff at site office - Plaintiff dismissed from employment - Whether plaintiff's dismissal lawful - Whether defendant entitled to rely on Employment Act 1955, s. 15(2) - Whether witness' testimony hearsay - Whether plaintiff's salary reduction without reason or notice - Whether plaintiff agreed to salary reduction - Whether plaintiff arbitrarily demoted - Whether defendant's explanation reasonable - Whether claim time barred*

E

F ***LABOUR LAW:*** *Employment - Absenteeism - Plaintiff absent for more than two consecutive days - Defendant could not locate plaintiff at site office - Plaintiff dismissed from employment - Whether plaintiff's dismissal lawful - Whether defendant entitled to rely on Employment Act 1955, s. 15(2) - Whether witness' testimony hearsay - Whether claim time barred*

G ***LABOUR LAW:*** *Employment - Reduction in salaries - Whether plaintiff's salary reduction was without reason or notice - Whether plaintiff agreed to salary reduction - Whether claim time barred*

H ***TORT:*** *Defamation - Claim based on innuendo - Whether plaintiff's claim based on mere allegations - Whether letter of dismissal to plaintiff defamatory*

I The plaintiff, the administrator officer of the defendant was dismissed from employment *vide* a letter ('said letter') dated 21 January 1999. The defendant contended that the plaintiff was continually absent from work for more than two consecutive days

('alleged days') without prior vacation leave approval and had therefore breached the contract of service. The plaintiff brought this action on the following claims: (i) that his dismissal was unlawful; (ii) that during his tenure of service, he was arbitrarily demoted and his salary was reduced without any reason or prior notice; and (iii) the said letter was defamatory and contained legal innuendo. The defendant denied the above allegations and submitted that the action was time barred. Furthermore, the defendant contended that it was adopting the provision of s. 15(2) Employment Act 1955 ('the Act') when it dismissed the plaintiff.

Held (dismissing the plaintiff's claim with costs):

(1) The defendant contended that the cause of action which arose on two different dates as pleaded in the statement of claim *ie*, on or about 1995 (when the plaintiff was demoted) and in 1998 (when the plaintiff's salary was reduced without any reason or prior notice), were time barred, however, having perused the documents tendered in court it was found that the cause of action arose from the date of said letter *ie*, on 21 January 1999. The plaintiff had therefore filed his claim within time. (para 4)

(2) The defendant was informed by its staffs that they could not locate the plaintiff. The Credit Administration Manager ('DW1') had personally attempted to find out whether the plaintiff was at the site office. DW1, who was at the site on the alleged days, went around the construction site, and did not see the plaintiff. The plaintiff contended that the fact that he was absent from the site office could not be taken into account, as the defendant had failed to call its staffs who had informed it of the plaintiff's absence. However, it was found that the plaintiff was absent on the alleged days as the testimony given by DW1 were facts within his own personal knowledge and it was not hearsay. (paras 7 & 8)

(3) The defendant was perfectly entitled to rely on the provisions of the Act as it was the law regulating the conduct of employers and employees. The plaintiff was deemed to have broken his employment contract when he was absent from work for two consecutive days; as such he had resigned on his own accord. Section 15(2) Employment Act 1955. (paras 11 & 12)

(4) With regards to the plaintiff's demotion, the reason given by the defendant was that the change of name of the plaintiff's rank was merely a renaming exercise as the defendant was going for listing at Bursa Saham. This was accepted as a reasonable explanation. (para 16)

(5) The defendant had to reduce the salaries of all workers including the plaintiff's due to financial crisis and all the workers including the plaintiff had to fill up a form, agreeing to the salary reduction. From the evidence given, it was clear that the plaintiff had agreed to a salary reduction when he filled up the said form. He should not have signed it if he was not agreeable to the reduction. (paras 18 & 19)

(6) The letter was not found to be defamatory; in fact, it was a statement of what actually happened. With regards to plaintiff's claim of legal innuendo, it was found that what he said in his evidence were mere allegations. There was no evidence adduced or witness called to prove that there were some special meanings, facts or circumstances and that there were people acquainted with the plaintiff and so might understand, that the letter was defamatory. (paras 24 & 32)

Case(s) referred to:

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

John Lee & Anor v. Henry Wong Jan Fook [1980] 1 LNS 190 FC ***(refd)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

R Murugason v. The Straits Times Press (1975) Ltd [1984] 1 LNS 31 HC ***(refd)***

Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***

Legislation referred to:

Employment Act 1955, s. 15(2)
Industrial Relations Act 1967, s. 20(1A)
Limitation Act 1953, s. 6(1)(a)

For the plaintiff - Wan Anuar; M/s SN Nair & Partners
For the defendant - Chan Hon Wai (Leow Tat Fah & Abdul Fareed Abdul Gafoor with him); M/s TF Leow & Assocs

Reported by Melinda Robert

JUDGMENT

Noraini Abdul Rahman JC:

Facts

[1] By way of a letter of appointment dated 3 June 1992 the plaintiff and the defendant had entered into an agreement whereby the plaintiff was appointed to the position of administrative officer of the defendant. (exh. P1). By letter dated 21 January 1999, the defendant informed the plaintiff that since plaintiff was continuously absent from work for more than two consecutive days since 7 January 1999 without applying or getting approval for leave which plaintiff should have done by filling in a standard leave form, the plaintiff had breached the contract of service and as such plaintiff was construed to have resigned on his own accord. Plaintiff unhappy with the letter then filed a suit against the defendant alleging that he was unlawfully dismissed by the defendant and that there was no domestic inquiry held. He also alleged that during his tenure of service with the defendant, he was demoted and the defendant had also reduced his salary. In addition, plaintiff also alleged defamation and legal innuendo on the part of the defendant.

[2] The defendant denied that plaintiff was unlawfully dismissed. They claimed that it is the plaintiff himself who had breached the terms of the contract by being absent from working for more than two continuous days and as such the plaintiff himself had resigned on his own accord. Defendant also denied defamation and legal innuendo on their part.

[3] After having conducted a full trial I have come to the following conclusion.

Whether The Suit Was Time Barred

[4] I will first deal with the defendant's submission that the plaintiff's claim was statute barred. Defendant in their submission said that the cause of action arose on two different dates as pleaded in para 6(a) and (b) of the statement of claim as follows:

> 6(a) On/or about 1995 the Defendant arbitrarily reduced the rank of the Plaintiff from Assistant Manager to Clerk of Works without providing reasons or advance notice.

A 6(b) From January to December 1998 the Defendant arbitrarily reduced the Plaintiffs monthly salary and or perks and or benefits and or allowances and etc without providing reasons or advance notice.

B Defendant's counsel submitted that the two dates of on or about 1995 and from January to December 1998 were time barred under s. 6(1)(a) of the Limitation Act 1953 and s. 20(1A) of the Industrial Relations Act 1967. Having perused the documents tendered in court, I am of the opinion that the cause of action arose from the date of the letter from defendant to plaintiff at exh. C P4 ie, on 21 January 1999. So on this issue, I find that the plaintiff had filed his claim within time.

Unlawful Dismissal

D **[5]** The plaintiff in his evidence stated that he was on the material date working. Also, on the dates when DW1 visited the site office, ie, 12, 13, 14 and 15 January 1999, he stated during cross examination he was at the site all day and if someone were to visit the site, they would have seen him. He also stated that E sometimes he went to TNB office. He also admitted he had a hand phone. Against this evidence, we have the evidence of DW1 who is the Credit Administration Manager of the Defendant company and he handled personnel matters relating to employees of the defendant company.

F **[6]** DW1 explained that due to the plaintiff's continuous absence from work for more than two consecutive days since 7 January 1999 without prior approval or without informing the office, the plaintiff had breached the terms of his employment contract and was deemed to have resigned on his own. DW1 G then proceeded to explain about the procedure that has to be followed by an employee who wanted to apply for leave. He said the following:

H An employee who wanted to apply for leave must fill in the Defendant company's standard leave application form at least 7 days before the intended leave date. The leave application form that has been filled in must be given to the Personnel & Admin Department for checking and confirmation whether the said employee is entitled to apply for the leave that had been applied for. The Personnel & Admin Department will then send the said I

leave application form to the relevant Departmental Head for approval and the said employee will be informed by the Personnel & Admin Department thereafter whether the said leave application had been approved or otherwise.

[7] At this point it is noted that plaintiff had said that he was at work on 7, 12, 13, 14 and 15 of January 1999. DW1 was then asked whether from 7 January 1999 to 21 January 1999, he had personally attempted to find out whether plaintiff was at work and he said yes. When asked to explain he stated that on 11 January 1999, it was reported by the project department staff they couldn't trace the plaintiff. He then planned his trip to the site on 12, 13 and 14 of January 1999 at about 10.30am. He was at the site for one or two hours. He went around the construction site and he did not see the plaintiff on those days. At that time, the site office run by the plaintiff was still existing as the project was still ongoing.

[8] Plaintiff's counsel in his submission stated that the staff from the project department who had told DW1 of plaintiff's absence from work including one Miss Teoh were not called to give evidence. As such the fact that the plaintiff was absent from the site office cannot be taken into account by the court. However, DW1 himself had on 12, 13 and 14 January 1999 visited the site to look for the plaintiff and he could not find the plaintiff on those three days. That evidence was within DW1's own personal knowledge and is not hearsay. Therefore, my opinion is that plaintiff was not working on 12, 13 and 14 January 1999.

[9] Now, the material letter of 21 January 1999 had the following paragraphs:

...

Furthermore, we were unable to locate you at the site office since 7th January 1999. It is your responsibility to inform us through telephone or other means whenever you are away from the office.

Since you have been continuously absent from work for more than two consecutive working days without prior vacation leave approval from the company, you have breached your contract of service. As such, it can be construed that you have resigned on your own accord.

A In pursuance to your termination of services with the company, we hereby request you to return the office keys to the main office not later than 1 February 1999 to the undersigned.

Thank you.

B Yours faithfully,

Sgd.

(Lim Cheng Kee)
Deputy General Manager

C

[10] Granted that it was hearsay evidence that plaintiff was not at work on 7 January 1999 but the wording of that letter is that plaintiff was absent since 7 January 1999. But the evidence of DW1 was that the plaintiff was not at work on 12, 13 and 14. So, since the plaintiff was not at work on those day therefore the words in the letter "since 7 January 1999" would encompass the dates 12, 13 and 14 which was more than two consecutive days.

[11] DW1 further stated that the defendant company had adopted the Employment Act 1955. Section 15(2) of the Employment Act 1955 provides the following:

> An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

[12] The Employment Act 1955 is the law of the land regulating conduct of employers and employees. The defendant is therefore perfectly entitled to use the provision in their dealing with the plaintiff. That provision had in fact been used by the defendant saying that because of plaintiff's absence from work for two consecutive days, he was deemed to have broken his contract of service with the defendant. As such, he had resigned on his own accord.

[13] With the facts and the law as stated above, I have come to a conclusion that this is not a case of unlawful dismissal by the defendant but rather the plaintiff had brought it upon himself the

consequences of his absence from work. Therefore, there is no need for the defendant to hold a domestic inquiry as this is not a case of misconduct leading to unlawful termination or dismissal of the plaintiff.

Demotion

[14] Plaintiff alleged that he was demoted. In his evidence in chief (witness statement) he stated the following:

> A.15. The Defendant's company on or about 1995 has arbitrarily demoted me to the position of clerk-of-works from Assistant Manager. Then, from January until December 1998, the Defendant's company has arbitrarily reduced my monthly salary, allowances and benefits without providing reasons and advance notice.

[15] He continued by saying the following:

> A.22. I was appointed by the Defendant company as Administrative Officer on 3-6-1992. I received salary increment, allowances, benefits and bonuses. I also was promoted to the position of Assistant Manager, transferred to Project Department, then downgraded me to clerk-of works, (from Level 1 Officer to grade 01). After that, the Defendant company has arbitrarily reduced my monthly salary, allowances, benefits without providing reason and advance notice.

[16] DW1 in his evidence explained that Level 1 Officer and Grade 01 Officer are the same ranking. The reason for the change of name was because the defendant was going for listing on Bursa Saham. It was just a renaming exercise. I find the explanation reasonable and I accept it.

Salary Reduction

[17] Although both counsel for plaintiff and defendant did not address the issue of salary, according to exh. P3 (pp. 9-19 bundle of document B) plaintiff started work with a salary of RM2,300 and increased steadily every year until the year 1998 when his salary was reduced. He stated that this was done without any reason or advance notice given to him.

[18] Both DW1 and DW2 testified that it was because of the financial crisis that the defendant reduced the salaries of all workers including DW1 and DW2. DW2 further testified that all employees including the plaintiff had to fill the following form regarding pay cut. Reproduced below is the form.

FARLIM GROUP OF COMPANIES

Pay Cut

(Complete this form in your own handwriting)

Date : 21/8/98

Name : Mr. Cheah Lim Employee No: 192

Department: Technical Position/Grade:

My name as abovementioned (NRIC No: 7893782) hereby agree to 10% salary cut with effect from 1 September 1998. My current salary before pay cut is RM ___.

Sgd.

(Applicant's Signature)

(Sgd.)

Witness's Signature :

(Departmental Head)

[19] DW2 testified that plaintiff signed the form above applicant's signature. Plaintiff on the other hand when asked during cross examination whether the signature was his, he answered "I'm not sure." I am of the opinion that the form was signed by him. If he was not in favour of the reduction, he shouldn't sign it. This document had been tendered in court and marked as D13. As regard interpretation of document, Abdul Kadir Sulaiman JCA, (as he then was) in the case of *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259, said:

> The construction of a contract is a question of law to be determined by this court. This court is not bound by the admission of witnesses or the concession made by counsel in the court below.

[20] In the case of *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96, Gopal Sri Ram JCA as he then was said:

> It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.

[21] I am of the opinion that the statement of the law is equally applicable to the form at exh. D13.

[22] Based on the above, I find that the plaintiff had indeed signed the document voluntarily agreeing to a salary cut.

Defamation And Innuendo

[23] In defamation, the *locus classicus* case is *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321. In that case, Mohamed Dzaiddin J (later Chief Justice) said:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged. (*Rajagopal v. Rajam* [1972] 1 MLJ 45).

Are The Words Defamatory?

[24] After reading the letter, I do not find there's anything defamatory about it. It is a statement of what actually happen. The plaintiff himself did not offer explanation as to what words in the letter defame him. In fact, very little evidence was given on defamation and innuendo. What he said in his evidence do not amount to defamation. He said his witness statement the following:

> A23. The reason is that even though the construction industry is a huge industry but knowledge of my dismissal was still known to the industry somehow from rumours or other sources unknown. Further, the Defendant's company was one of the leading companies in the construction industry

A and the Chairman & CEO of the company, the then Datuk Seri Lim Gait Tong was also the president of the Penang Chinese Assembly Hall and later president of the Federation of Chinese Associations Malaysia (Hua Zong), the status which was very influential amongst the Chinese community and construction industry.

B

[25] It is noted that he is relying the defamation on rumours or other sources. The court could not rely on rumours or other sources. He blamed the Chairman and CEO of the defendant company Datuk Seri Lim Gait Tong who was also President of the C Penang Chinese Assembly Hall and later president of the Federation of Chinese Associations Malaysia (Hua Zong) but failed to testify in what way Datuk Seri Lim Gait Tong had defamed him. Therefore, in order to persuade the court that the words were defamatory it is not enough to make allegations without D proof.

Did The Words Refer To Plaintiff?

[26] As I had stated above, the court did not find the words E defamatory. Of course the letter refers to the plaintiff but they were not defamatory.

Were The Words Published?

[27] The answer is no. The said letter was addressed to him. F This was not in issue and not disputed. In cross examination he himself admitted that he was the one who published the letter to others. He said that he told members of his family. So, how could the defendant be blamed for plaintiff's own wrongdoing.

G **[28]** Defence counsel in his submission cited several cases to support his argument that even if the letter was typed by a secretary or a clerk, it is not defamatory and that it is governed by the defence of qualified privilege. The plaintiff never adduced evidence or testify that the letters were published to the typist or H the clerk of the defendant company. But for good measure defence counsel had quoted from the book *"Law of Defamation and Malicious Prosecution"* by V Mitter, 11th edn as follows:

On the question of privilege according to the English authorities, if the occasion is privileged as between the writer of the document I and the person who has ultimately to receive it, this privilege is

not lost merely because the document has been seen by the writer's clerk or servant, if such communication was made to the clerk or servant in the reasonable, ordinary and usual course of business.

[29] Defence counsel also cited the case of *John Lee and Another v. Henry Wong Jan Fook* [1980] 1 LNS 190, a decision of the Federal Court where Chang Min Tat said:

> A statement by a servant to his master as to the character of a fellow servant in the master's employ comes within the privilege: *Scarll v. Dixon* [1864] 4 F & F 250; 176 ER 552 and *Mead v. Hughes* [1930] 2 KB 226.
>
> It has been suggested, even if only tentatively, that there was publication to the typist who typed the letter. The short answer is in *Osborn v. Boulter* [1930] 2 KB 226 where it was held that defamatory words on a privileged occasion do not lose their privilege by being dictated to a clerk or typist in the ordinary course of business.

[30] In the case before this court, no evidence was led on publication of defamatory words to the secretary or clerk.

[31] As regards legal innuendo, defence counsel submitted that the plaintiff's claim must fail. He cited the Singapore case of *R Murugason v. The Straits Times Press (1975) Ltd* [1984] 1 LNS 31; [1984] 2 MLJ 10 where it was held by Chua J that:

> (1) the plaintiff's action was based entirely upon a legal innuendo. The only, evidence had been that of the plaintiff himself who testified as to what innuendo he considered the report to contain. No evidence whatever had been called to prove that there were some special meanings, facts or circumstances in this case and that there were people acquainted with them and so might understand the report in the defamatory sense alleged, and that the report was published to them. Such evidence was an essential element in a case of legal innuendo;
>
> (2) the plaintiff had failed to establish any legal innuendo and his claim must therefore be dismissed.

A **[32]** Similarly in our case, no evidence whatever was adduced and no witnesses had been called to prove that there were some special meanings, facts or circumstances and that there were people acquainted with the plaintiff and so might understand that the letter was defamatory. All the plaintiff said in his evidence are
B mere allegations.

[33] Based on the above reasons, I dismiss the plaintiff's claim with costs of RM30,000 as agreed by both parties.

C

D

E

F

G

H

I